No. 12306

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

C. E. BONNELL, Doing business as The Bonnell Construction Company, and ROY T. EARLEY, Doing business as The Roy T. Earley Company, Joint Adventurers under the Trade Name of Bonnell Construction Company of Bremerton,

Appellees,

and

C. E. BONNELL, d/b/a The Bonnell Construction Company and ROY T. EARLEY, d/b/a Roy T. Earley Company, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

Brief for the United States of America

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney

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JURISDICTIONAL STATEMENT

These appeals are taken by the United States of America, plaintiff below, and by C. E. Bonnell and Roy T. Earley, defendants below (which respective

designations of parties will be used in this brief to avoid confusion) from a judgment of the United States District Court for the Western District of Washington, Southern Division, which provides, in pertinent part, that plaintiff is entitled to collect interest, at the rate of three percent (3%) per annum, from defendants for the delay in payment of the net principal amount demanded pursuant to unilateral determination of excessive profits, within the meaning of the Renegotiation Act of 1942, as amended, issued and entered, on or about May 17, 1945, by the RFC Price Adjustment Board with respect to defendants' fiscal year ending December 31, 1942.

The action was begun in the court below after rejection of the offers made by defendants in amounts which did not concede the right of the government to collect interest, at the rate of six percent (6%) per annum or at all, on an unpaid renegotiation liability under a contract entered into with the government prior to the Renegotiation Act, that is, on unrefunded excessive war profits. The jurisdiction of the United States District Court over the action, and this court's appellate jurisdiction herein, are conferred by Section 403(c), Renegotiation Act of 1942, as amended; (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245, as amended by Section 801 of the Revenue Act of 1942, 56 Stat.

798, 982; by Section 1 of the Military Appropriation Act, 1944, 57 Stat. 347; and by Act of July 14, 1943, 57 Stat. 564). Section 24(1), Judicial Code, U.S.C., Title 28, Sec. 41(1), which has been reenacted as U.S.C. Title 28, Sec. 1345 (by the Act of June 25, 1948; and U.S.C. Title 28, Sections 1291 and 1294(1).

QUESTIONS PRESENTED

1. Is the Renegotiation Act, as amended, (56 Stat. 245, 982) to authorize renegotiation on war contracts with certain designated executive departments of the government, valid as applied to profits realized under prime contracts entered into by contractors with the government, prior to April 28, 1942, the effective date of the Act?

2. Is there a basis for allowance of interest on an unpaid renegotiation liability where the war contract involved was entered into previous to the taking effect of the Act?

3. If interest may be awarded on an unpaid renegotiation liability pursuant to contract entered into prior to enactment of Renegotiation Act, what factors should determine the rate of interest and what is the proper rate in the instant case?

STATEMENT OF PLEADINGS AND FACTS

This is an action by the United States and members of the Board of Directors of Reconstruction Finance Corporation in their official capacities to collect an amount alleged to be owed by defendants pursuant to an unilateral determination, under the Renegotiation Act, that defendants had made excessive profits on contract designated as No. W869 - Eng. 6202, during their fiscal year ending December 31, 1942. The suit was filed June 29, 1948 (R. 2 - 17). The complaint alleged that renegotiation proceedings were commenced with the defendants by the RFC Price Adjustment Board and on or about May 17, 1945, it was thereby determined that the sum of $55,000.00 represented excessive profits; that on or about May 17, 1945 the chairman of the RFC Price Adjustment Board in compliance with law and pursuant to duly delegated authority, issued a unilateral determination and order that $55,000 of the profits realized by the contractor during the fiscal year ended December 31, 1942, under said contract was excessive (R. 4); that on or about May 17, 1945 the defendants were duly notified of this determination and directed to repay to said board, the amount of excessive profits so determined, less the applicable tax credit, (computed at $35,034.59) (R. 5); that no part of the amount of excessive profits so determined had been paid by de-

fendants, but that the sum of $7,076.45 had been withheld out of funds otherwise due to defendants (R. 5). Judgment was prayed for in the sum of $13,-341.59, the net balance after the application of tax credit and withheld amount to interest and principal, plus interest on the net balance at the rate of 6% per annum from September 29, 1945, and for costs (R. 6).

Thereafter on July 20, 1948 counsel filed motions to strike and motions to dismiss on behalf of each defendant. (R. 17-20). The ground of the motions to strike involved all references to interest liability, and the ground of the motions to dismiss, as later argued, was the question of constitutionality of the Renegotiation Act in its application to a government executed contract. (R. 21); which motions were denied by order entered January 27, 1949, and defendants allowed 30 days within which to answer. (R. 20 - 22).

Defendants' answer (R. 22 - 30) admitted receiving RFC Price Adjustment Board's Determination of Excessive Profits, the same as Exhibit "B" to the complaint, and the demand as contained in Exhibit "C" to the complaint, (R. 23), the computed amount of tax credit, and withheld amount, as well as asserting a tax refund of $307.73 not included in the complaint (R. 24), and their refusal to comply with the direc-

tion to pay voluntarily any sums of money claimed to be due under said alleged renegotiation (R. 24). As Affirmative Defenses, defendants raised the issue of renegotiation as to defendant Earley on the contract here involved without reference to renegotiation on all his other contracts; and as a further issue that the government did not pay 6% interest on its obligations, and in addition had not prosecuted its claim with such due diligence as to entitle it to be allowed that rate of interest. (R. 25 - 30).

After answer, the plaintiffs below moved, on April 22, 1949, for judgment on the pleadings on the grounds that the defendants as joint adventurers had performed the contract in question and realized profits therefrom which had been duly determined to be excessive in the sum of $55,000.00 for the fiscal year ending December 31, 1942, and for which the defendants were liable to plaintiffs; that plaintiffs were suing to recover the net balance of $13,341.59 remaining after application in reduction thereof of said tax credits and sums withheld which had been applied either to payment of interest theretofore accrued or to reduction of principal, (R. 31); and that the correctness of the amount claimed as excessive and the defenses pertaining thereto were in the exclusive jurisdiction of the Tax Court of the United States, and the issues of law entertainable in this court and

heretofore raised by the defendants pursuant to their motions had been determined by the district court in plaintiff's favor; that the defendants were indebted to plaintiffs in the sum of $13,341.59, and interest from September 29, 1945, as pleaded, at such rate of interest as the court should determine proper, leaving the matter of interest and the rate, questions of law, for the decision of the court, and rendering such motion for judgment proper pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, as amended (R. 30 - 33).

The District Court was satisfied that interest should be allowed on the net amount of the claim (R. 37), but held that the rate of interest, being concededly within the discretion of the court, it was on the equity side of the law to determine what would be equitable, and thereupon fixed the rate herein at 3% instead of 6%. (R. 38).

Judgment was accordingly entered, on June 1, 1949, in favor of the plaintiffs in the sum of $14,240.29, principal and interest to that date, and costs taxed at $39.00 (R. 39 - 42), the net balance having been further reduced by a tax refund of $307.73 in addition to its reduction from recomputation of interest at 3% with consequent increased application of

credit amounts to principal theretofore applied to interest at 6%.

On this appeal, defendants contend that the provisions of the Renegotiation Act, as amended, are in violation of the Fifth Amendment to the Constitution of the United States in so far as they may be said to authorize retroactive application to prime contracts entered into by contractors with the government, prior to April 28, 1942, the effective date of said Act; and further contend that no right to collect interest upon the basis of either an express or an implied contract, as to contract entered into prior to Act, exists. (R. 54-56; 63-65).

Plaintiff, on the other hand, contends that the retroactive application of the Renegotiation Act has been determined both as to government, as well as to private contracts and maintains that defendants are legally obligated to pay interest at the rate of six percent (6%) per annum on their net principal renegotiation liability of $13,341.59, from September 29, 1945, as more particularly set forth in its Statement of Points herein.

STATUTES AND REGULATIONS INVOLVED

I. STATUTES INVOLVED.

The original Renegotiation Act (Sec. 403 of the

Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) and its various amendments (Sec. 801 of the Revenue Act of 1942, 56 Stat. 798, 982; Sec. 1 of the Military Appropriation Act, 1944, 57 Stat. 347; the Act of July 14, 1943, 57 Stat. 564; Titles VII and VIII of the Revenue Act of 1943, 58 Stat. 21, 78; and the Act of June 30, 1945, 59 Stat. 294, 50 U.S.C. App. 1191), which with exception of 1945 Act relating to termination date of the Renegotiation Act are pertinent to the present case.

Remington's Revised Statutes of Washington, Section 7299, which in pertinent portion is as follows:

> "Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties. * * * *"

II. REGULATIONS INVOLVED.

Section 622, Joint Renegotiation Manual:

> "It is proper procedure to make a demand for payment in connection with an unilateral determination and state in such demand that interest will accrue at the rate of 6% per annum from and after a date inserted in the demand on any amount due under such unilateral determination and unpaid. The date ordinarily to be inserted in the demand will be approximately fifteen days from the date of the unilateral determination but the Department issuing the unilateral determination may provide for a greater or lesser time. The time to be allowed is in the discretion of the

> Department and should be a reasonable time considered equitable under the circumstances, in view of the necessary time for mailing and for obtaining computation of the tax credit (pursuant to Section 3806, Internal Revenue Code).

Section 626.2(3), Renegotiation Regulations, applicable to renegotiation of fiscal years ending after June 30, 1943 contains the following:

> "Interest at the rate of 6% per annum accrues upon the amount determined as excessive profits to be eliminated less the tax credit, if any (pursuant to Section 3806, Internal Revenue Code) from and after the date fixed in the demand for payment."

STATEMENT OF POINTS

1. That the District Court erred in determining that 3% per annum is a proper rate of interest to be allowed plaintiff on its claim involved in this action, instituted June 29, 1948, to collect excessive profits, less credits, owed by defendants pursuant to unilateral determination, under the Renegotiation Act, that defendants realized excessive profits on a war contract during their fiscal year ending December 31, 1942.

2. That the District Court erred in fixing the rate of interest to be allowed on plaintiff's claim herein on the basis of what rate of interest the government would have paid for the use of equivalent funds pending payment of said claim, as a fair and

just compensation for defendants' failure and refusal to make payment upon demand.

3. That plaintiff is entitled to interest at the rate of 6% per annum upon the amount determined as excessive profits to be eliminated less tax credits and tax refund as set out in the pleadings contained in the record herein, from and after the date fixed in the demand for payment.

4. That plaintiff is entitled to recover judgment in the sum of $13,341.59 as principal balance due on its claim, plus interest thereon at the rate of 6% per annum from September 29, 1945, as prayed for in its complaint, less a withheld tax refund of $307.73 of April 6, 1948, as deductible from the amount of said interest, making a total as of June 1, 1949, the date of entry of judgment, in the sum of $15,974.84, principal and interest at said rate.

ARGUMENT

A. "THE RENEGOTIATION ACT, INCLUDING ITS AMENDMENTS, HAS BEEN PROPERLY APPLIED TO CONTRACTS ENTERED INTO BEFORE ITS AND THEIR RESPECTIVE ENACTMENTS."

The Supreme Court in *Lichter v. United States*, 334 U. S. 742, at page 788, headed its discussion of

retroactivity with the foregoing statement, and further stated:

> "Congress limited the Renegotiation Act to future contracts and to contracts already existing but pursuant to which final payments had not been made prior to the date of enactment of the original Act. These included contracts made directly with the government and also subcontracts such as those here involved."

And within the limits so expressed, the Supreme Court in *Lincoln Electric Co. v. Forrestal*, 334, U.S. 841, decided per curiam the same day as, and on the authority of *Lichter v. United States*, supra, the issue herein in favor of the Act's validity.

In the Lincoln Electric case, the secretary of the Navy included in the contractor's renegotiable business upon which the Secretary's unilateral order was based, sales in the calendar year 1942, to Departments of the United States and their contractors and subcontractors. Since the Supreme Court, unlike the District Court (77 F. Supp. 444, 447) decided the merits of the controversy, it necessarily determined all the constitutional issues raised by the contractor as to the invalidity of the Act and its amendment.

Defendants find no fault with the general principles of retroactivity applied to parties and to contracts not with the government.

It is the position of defendants that "an exercise

of the sovereign right of the government to protect * * * the general welfare of the people", a power which is "paramount to any rights under contracts between individuals" should yield to the constitutional immunity of an isolated private contract from impairment to its proceeds.

See, in this connection, *Manigault v. Springs*, 199 U.S. 473, 480; *Norman v. Baltimore & Ohio R. Co.* 294 U.S. 240, 307-308; *Veix v. Sixth Ward Ass'n*, 310 U.S. 32; *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232;*Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 145, 156; *Richmond Corp. v. Wachovia Bank*, 300 U.S. 124; *Honeyman v. Jacobs*, 306 U.S. 539; and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435.

The Constitution does not prohibit retrospective legislation as such, and the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution.

League v. Texas, 184 U.S. 156, 161;
Calder v. Bull, 3 Dall, 386;
Watson v. Mercer, 18 Pet. 88, 109;
Blount v. Windley, 95 U.S. 173, 180.

The Supreme Court has from early days sustained the validity of much legislation having a retroactive effect on existing property rights.

Watson v. Mercer supra; Curtis v. Whitney, 13 Wall. 68.

This principle is not different when the property rights happens to be a contract.

Calhoun v. Massie, 253 U.S. 170, 176.

We do not believe it is defendant's intention to argue that federal employees are entitled to receive and hold their compensation free and clear of future income tax legislation, or against the validity in such case of retroactive income tax legislation.

See *Baker v. Commissioner of Internal Revenue* 149 F. (2d) 342, cert. den. 326 U.S. 746.

Retroactive income taxation, which has long been held valid, is an especially forceful analogy to the recovery of net profits realized under executed contracts.

Cooper v. United States, 280 U.S. 409;
Welch v. Henry, 305 U.S. 134, 148.

As this court has stated in *Spaulding v. Douglas Aircraft Co., Inc.,* 154 F. (2d) 419, 423 " * * * the power in war to recapture for the war treasury excessive profits from existing contracts is certainly as great as the power in peace to tax in a succeding year the income earned prior to the tax legislation".

In support of their position, the defendants rely in particular on *Lynch v. U. S.*, 292 U.S. 571, and *Perry v. U. S.*, 294 U.S. 330 (R. 64). The Lynch case involved policies of war risks insurance and raised the question of taking property without making just compensation. The instant case involves taking or recapturing excessive profits over and above just compensation. If the objection of taking property without making just compensation could be raised as to recapturing excessive profits on renegotiation, then the same objection would be applicable to any and all forms of taxation.

While the Perry case sustains the contractual effectiveness of the gold clause as between government and citizen, that case, however, involved no application of the war powers of Congress, and offers no assistance.

National Electric Welding Machines Co. v. Stimson, 10 T.C. No. 8.

B. (1) INTEREST IS PROPERLY ALLOWABLE ON AN UNPAID RENEGOTIATION LIABILITY NOTWITHSTANDING THE WAR CONTRACT INVOLVED WAS ENTERED INTO PREVIOUS TO THE TAKING EFFECT OF THE ACT.

It is a long established tenet of the law that interest runs from the date of default to the date of

payment, upon an obligation to pay money. That legal principle was recognized early, and has been consistently maintained by the Supreme Court of the United States. In the early case of *Curtis, et al v. Innerarity, et al* (1848) 6 How. (U.S.) 146, the Supreme Court succintly stated stated (p. 154):

> "It is a dictate of natural justice, and the law of every civilized country, that a man is found in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Everyone who contracts to pay money on a certain day knows, that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said, that such is the implied contract of the parties. * * * "

The principle enunciated by the Supreme Court in the Curtis case, supra, has been followed precisely in many of its subsequent decisions. For example, in the well known case of *Young v. Godbe* (1872) 15 Wall. (U.S.) 562, which involved an action on an account stated, the court held that interest should run upon a breach of an agreement to pay money, even though such agreement did not expressly provide for interest, and pointedly said (pp. 565-566):

> " * * * If a debt ought to be paid at a particular time, and is not owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. And if the account be stated, * * *, interest begins to run at once.
>
> It is said there is no law in the territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character."

A more recent reiteration of the principle may be found in *Royal Indemnity Co. v. United States* (1941) 313 U.S. 289, where, in a suit brought upon a surety bond running to the government, the Supreme Court declared (pp. 296 - 297):

> "* * * And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment. * * *"

The principle that interest, computed from date of default to date of payment, may be collected on an obligation to pay money, has been held to be as fully applicable to such an obligation arising from uni-

lateral action taken by the government, as it is when the obligation derives from a contract.

See for example *Railroad Co. v. United States* (1879), 101 U.S. 543; *United States v. Erie Railway Company* (1882), 106 U.S. 327; *United States v. Mexican International R. Co.* (C.C.W.D. Texas, 1907), 154 Fed. 519, in each of which the right of the government to interest on unpaid obligations for customs duties or for taxes was upheld.

Those earlier holdings were expressly approved by the Supreme Court in *Billings v. United States*, (1914) 232 U.S. 261, which decided that interest accrued on unpaid federal taxes, although the pertinent tax statute contained no provision therefor. In the opinion in the Billings case, the Supreme Court made the following significant pronouncement. (P. 286):

> "* * * Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young v. Godbe*, 15 Wall. 562, 565:
>
> * * * * *
>
> "And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice, even though no express statute existed for compelling this

payment. So also as to the nature and character of the obligation to pay taxes. * * * "

The law is settled that unpaid liabilities of stockholders in a national bank, resulting from assessments made by the comptroller of the currency, do bear interest. In the leading case of *Casey v. Galli* (1876), 94 U.S. 673, the Supreme Court ruled that (pp. 677 - 678):

> " * * * The sum to be paid being liquidated, and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. *Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation.* * * * "
> (Italics supplied)

To the same effect, see *Bowden v. Johnson* (1882), 107 U.S. 251, 263; *Garvy v. Wilder* (C.C.A. 7, 1941), 121 F. (2d) 714.

It would, therefore, appear that in the absence of a statutory provision to the contrary, the government is entitled to interest on an obligation owed to it.

> See *Billings v. United States* supra;
> *Board of Commissioners v. United States*, 308 U.S. 343.

It should be pointed out that although there is no language in the Renegotiation Act, as amended, or in any other Act of Congress, which specifically

allows or forbids interest on renegotiation liabilities either prior to payment or prior to judgment, as the case may be, the courts have consistently held that the government is entitled to collect interest on unpaid renegotiation debt owed to it. Such cases are numerous and with no exception whatever, have to date, fully recognized that determinations of excessive profits, made pursuant to the Renegotiation Act, as amended, are obligations for the payment of money to the government, and, in accordance with the legal principle hereinbefore set forth, bear interest. Included in the list of such cases are the following decisions of this court:

Sampson Motors, Inc. v. United States, 168 F. (2d) 878; *United States v. Eason Grinding Company*, Civil Nos. 5032 and 5445, D.C. S.D. Calif., C. Div., April 19, 1947, aff'd per curiam, C.C.A. 9th Cir. April 25, 1949.

(2) The Government is entitled to collect interest at the rate of six percent (6%) per annum on Renegotiation Debts Arising from Determinations of Excessive Profits Made Pursuant to the Renegotiation Act, as Amended.

All of plaintiff's specifications of error, Points I to IV, inclusive, embody practically the same subject matter and the plaintiff's argument as to one will

apply with equal force to all. Therefore, they will be discussed together.

An examination and analysis of pertinent Congressional policy, judicial precedents, administrative regulations and analogous statutes fully support the government's position herein that the proper rate of interest to which it is entitled on unpaid renegotiation debts, such as owed by the defendants, is six percent (6%) per annum.

(a) CONGRESSIONAL POLICY.

Defendants were renegotiated pursuant to the Renegotiation Act of 1942, as amended, by the RFC Price Adjustment Board for the purpose of eliminating excessive profits, within the meaning of that Act, realized by defendants during their fiscal year ending December 31, 1942 (R. 4). That Act, which applies to renegotiation of contractors and subcontractors for fiscal periods ending before July 1, 1943, clearly indicates that Congress intended that the refund of War Profits, found to be excessive should be accomplished with the utmost dispatch. To carry a policy of speedy collection of unpaid renegotiation debts into effect, Congress has provided strong and broad administrative methods of making such collection.

Section 403(c) of the Renegotiation Act of 1942

as originally enacted (Sixth Supplemental National Defense Appropriation Act; Act of April 28, 1942; Public Law 528, 77th Congress; 2d Sess.) provided:

> "(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or the subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and sub-contracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contract or subcontracts contain a renegotiation or recapture clause. Provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act."

Following the enactment of the Renegotiation

Act, the Secretaries of the several Departments named therein put into effect an administrative policy of eliminating excessive war profits as quickly as possible, by the recourses granted them including an interest charge of six percent (6%) per annum as a deterrent to non-payment of such excessive profits to the government.

To secure clarifying amendments, which if made into law, would merely ratify existing administrative practice, the War and Navy Departments proposed the same, which were enacted by Congress. See Section 403(c) (2) of the Renegotiation Act of 1942, as amended. That section, originally being found in Section 801(a), Revenue Act of 1942 (Act of October 21, 1942; Public Law 753, 77th Cong., 2d Sess.) provides, in pertinent part:

> "(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually

paid to him; or (v) by any combination of these methods, as the secretary deems desirable. The secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * *"

It is submitted that, by the latter amendment to the original 1942 Renegotiation Act, Congress, in effect, approved and ratified the prior and existing administrative construction of and practice under Section 403(c) supra, including the collection of six percent (6%) per annum interest on unpaid renegotiation liability.

In the meantime publications of administrative interpretation of the 1942 Renegotiation Act, as amended, were made. See, Principles, Policy and Procedure to be followed in Renegotiation, issued by the War Department on August 10, 1942; Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission, published on March 31, 1943; and Joint Renegotiation Manual, pertaining to fiscal periods ending prior to July 1, 1943, and promulgated January 27, 1944. Section 622, Joint Renegotiation Manual, provided, and still provides, that interest, at the rate of six percent (6%) per annum, shall be collected on unpaid renegotiation

debts due to the government as a result of unilateral determination of excessive profits for fiscal periods ending prior to July 1, 1943.

Congress was aware of and knew of the Regulation, when it subsequently enacted the Renegotiation Act of 1943 (Section 701, Revenue Act of 1943; Act of February 25, 1944; Public Law 235, 78th Cong., 2d Sess.) The latter Act, relating to elimination of excessive war profits for fiscal years ending after June 30, 1943, contains the following pertinent provisions (Sec. 403(c) (2) thereof):

> "(2) Upon the making of an agreement, or the entry of an order (unilateral determination of excessive profits), under paragraph (1) by the (War Contracts Price Adjustment) Board, * * *, determining excessive profits, the Board *shall forthwith authorize and direct* the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from

the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * *"
(Italics supplied).

This section became law on February 25, 1944, effective date of the 1943 Renegotiation Act. On March 3, 1944, the War Contracts Price Adjustment Board promulgated its Renegotiation Regulations for renegotiation pursuant to the Renegotiation Act of 1943, relating to fiscal periods ending after June 30, 1943. Section 626.2(3), Renegotiation Regulations, provided, and still provides, that unpaid amounts due to the government, as a result of renegotiation within the provisions of the 1943 Renegotiation Act, shall be collected, with interest thereon at the rate of six percent (6%) per annum.

The 1943 Act provided for redeterminations de novo of excessive profits by the Tax Court of the United States, at the option of a contractor or subcontractor aggrieved by a unilateral determination of excessive profits and within a stated time limit. Since these provisions 403(e) (1) and (2) permit the Tax Court to make a redetermination of such excessive profits at an amount less than, equal to, or greater than the original determination involved in the de novo proceeding, Congress had to provide funds for

the refund of payments of renegotiation debts, made by contractors and subcontractors who subsequently might be successful in securing a reduced determination of excessive profits in a Tax Court proceeding. Such funds were made available by Congress in the following appropriation acts:

(1) Public Law 40, 79th Cong., 1st Sess. relating to the fiscal year ending June 30, 1946;

(2) Public Law 521, 79th Cong., 2nd Sess. relating to the fiscal year ending June 30, 1947;

(3) Public Law 271, 80th Cong., 1st Sess. relating to the fiscal year ending June 30, 1948; and

(4) Public Law 640, 80th Cong., 2nd Sess. relating to the fiscal year ending June 30, 1949.

Each of these appropriation acts provides for refund of renegotiation payments to contractors or subcontractors successful in the Tax Court, after they have made such payments to the several Secretaries of the Departments named in the 1942 Renegotiation Act, as amended, or to the War Contracts Price Adjustment Board under the 1943 Act, with interest on such refunds at not to exceed four percent (4%) per annum. These several Acts made no provision that the rate of interest known to be collected on unpaid renegotiations liabilities owed to the government,

that is, six per cent (6%) per annum, should be correspondingly reduced to four percent (4%) per annum.

It is submitted that, when Congress, with full awareness of the existing administrative interpretation of the "collection provisions" of the 1942 Renegotiation Act, as originally passed and as amended, and also of the 1943 Act, supra, enacted the amendments made in the 1942 Renegotiation Act by the Act of October 21, 1942, supra; enacted Section 403(c)(2) of the Renegotiation Act of 1943, supra; and enacted the successive renegotiation refund appropriation acts listed, supra, it thereby approved and ratified the administrative construction of, and the administrative practice in applying, such "collection provisions" of the respective Renegotiation Acts. The interpretation of a statute by an agency charged with its administration, during a period when Congress is legislating on the same subject matter, is indicative of Congressional intent that such interpretation is to continue.

Biddle v. Commissioner (1938), 302 U.S. 573; *United States v. Shreveport Grain Elevator Co.* (1932) 287 U.S. 77; *McCaughn v. Hershey Chocolate Co.* (1928), 283 U.S. 488; *Iselin v. United States* (1926), 270 U.S. 245.

The clearly-expressed Congressional policy to effect expeditious recovery and collection by the government of unpaid renegotiation liabilities owed to it by contractors and subcontractors, and the manifest need to charge interest on such unpaid debts at a rate per annum sufficient to deter the withholding of such money from the government, especially during the war period of necessarily-high governmental expenditures, has been plainly expounded and succinctly stated in *United States v. Strontium Products Co., et al*, 68 F. Supp. 886, 888.

> " * * * *The tenor of the Act clearly reveals a Congressional purpose to effect speedy collection.* The provision authorizing review by the Tax Court is specifically limited so as to not operate 'to stay the execution of the order of the Board'. Various means are provided to speed recovery; by withholding money owed to the contractor, by revision of contracts, by ordering third parties to withhold, by repayment, credit or suit, or by any combination of these methods. *Such a statutory policy makes it essential to exact interest from the contractor who refuses to pay, and who retains the use of the money while depriving the government of its use, so as not to penalize prompt contractors who comply with the letter and spirit of the Act.*" (Italics supplied).

The Strontium case is cited with unqualified approval by this court in *Sampson Motors, Inc. v. United States* (C.C.A. 9, 1948), 168 F. (2d) 878, 879, awarding interest, at six percent (6%) per annum,

on an unpaid renegotiation liability owed to the government.

The defendants by way of objection to the allowance of the rate of 6% set up in their Answer (R. 27-29) the proposition that it would be inequitable to charge such rate where an Assistant Attorney General, Mr. John F. Sonnett, then in charge of the claim, had not advised the defendants of the Department's final position on the matter in due course following their offer of compromise and settlement. Parenthetically, it may be stated here that Mr. Sonnett had been placed at the head of the important anti-trust litigation and had ceased to be connected with the matters in question.

The plaintiffs below moved for judgment on the pleadings (R. 30) without delaying the action by entry of denial of defendants' alleged cause of prior delay. The District Court, assuming thereupon that the government was "at least as culpable as the defendant in this case" determined that it would be doing equity to reduce the rate of interest to somewhere between what the government would have been compelled to pay and what the defendants would have had to pay for money borrowed (R. 36-38). This, the court below proceeded to do without any proof taken or allegations made as to what damage,

if any, the defendants had suffered by reason of the plaintiff's failure to make earlier answer to their offer or as to what the loan of the excessive profits funds had earned for the defendants in their contracting business during the interim. Certainly, the principles of equity required that the court take into consideration in the first place what damage, if any, the defendants had suffered by not being given earlier notice of their offer's rejection rather than, upon the open charge of delay, to place the penalty therefor upon the government. Nor is there any allegation or showing or any reason disclosed by the record to conclude that an earlier rejection would have resulted in earlier payment being made by defendants. Defendants were content to sit by and not avail themselves of the opportunity for speedy relief, if entitled to any, by taking their grievances to the Tax Court, and should not now be heard to complain of any delay attending offers in compromise, which whether so designed or not, afforded the defendants an opportunity to look forward to and take advantage of whatever the future held in the way of more favorable decisions, or legislation relating to such matters then pending.

Confronted with consideration of the factors used by the court below in arriving at a rate of interest,

the court in *United States v. Strontium Products Co. et al*, 71 F. Supp. 475, 477, pointedly stated:

> "As to the rate of interest, defendants (that is, the renegotiated contractor) insist that since the Act (that is, the pertinent refund appropriation act) provides for payment of interest on refunds at a rate not in excess of four percent, it would be inequitable to exact interest from defendants at a greater rate. *The fact that interest rates vary according to a borrower's financial standing is a proper subject of judicial notice.* Banks are quite willing to loan money to the government at a lower rate than that which they would consider a proper rate for the ordinary commercial borrower. *Four percent has long been considered an ample rate of interest on a government obligation; but even in these days of cheap money, the accepted and legal commercial rate for the use of money is six percent.* The fact that defendants kept in their bank account a large amount of money, enough to have paid the sum which they admitted they owed, cannot excuse them from paying interest on that amount, along with the remainder. The money was in their control, and they could have used it for their own purposes. *In my opinion, to fix any other rate of interest than six percent would be an abuse of discretion on the part of the court, and might encourage others to be slow in paying government assessments or awards.* Therefore, the rate of interest in this case will be fixed at six percent." (Italics supplied).

To the same effect, see also *Sampson Motors Inc., v. United States*, supra.

That the collection of renegotiated excessive war profits is not a penalty, is constitutional under the

Fifth Amendment of the Constitution of the United States, and is a recovery of the government's own money received by the renegotiated contractor or subcontractor as an overcharge, have been plainly recognized by the Supreme Court.

See *Lichter, et al v. United States*, 334 U.S. 742, 787.

(b) JUDICIAL PRECEDENTS.

In addition to the cases already discussed, interest at the rate of six percent per annum has been awarded to the government on unpaid renegotiation debts, in spite of opposition thereto by the respective contractors or subcontractors, in a number of cases unreported or where the fact thereof does not appear in the written decisions. For example, see *Hickey & Company v. United States*, 168 F. (2d) 752, affirming per curium *United States v. Hickey*, 70 F. Supp. 13.

An analysis of the classic line of leading cases, wherein the Federal courts have awarded interest to the government on unpaid debts owed to it, despite the absence of specific statutory provision therefor, discloses the following, wherein 6% was allowed:

Railroad Co. v. United States, 101 U.S. 543;

United States v. Erie Railway Company, 106 U. S. 327;

Billings v. United States, 232 U.S. 261; and

Royal Indemnity Co. v. United States, 313 U.S. 289, all involving unpaid taxes.

And in *United States v. Mexican International R. Co.*, 154 Fed. 519, involving unpaid customs duties, the court in Texas applied the pertinent statute of that state, providing for 6% in the absence of express agreement to the contrary, as did the court in New York in the *Royal Indemnity* case, supra, measuring the award of interest by the law of New York fixing the rate of 6% in such cases.

(c) ADMINISTRATIVE REGULATIONS.

Pursuant to regulation, the demand for payment served on defendants included notice of the charge of interest at the rate of 6% per annum on the net amount due. (R. 16).

Such administrative regulations have been held by the courts to be "persuasive" and "worthy of substantial consideration."

See *United States v. Strontium Products Co., et al*, 68 F. Supp. 886, 888, supra, and *Sampson Motors, Inc. v. United States*, supra.

(d) ANALOGOUS STATUTES.

An examination of the local statute, applicable

to the case at bar indicates that six percent (6%) per annum is the proper rate of interest to allow the government on defendant's renegotiation liability.

Although they are not necessarily bound by such local statutes, the Federal courts may turn to them for guidance in determining the rate of interest to be awarded to the government in suits to collect obligations owed to it. That principle was plainly recognized and affirmed by the Supreme Court in *Royal Indemnity Co. v. United States*, supra, wherein it stated (p. 297):

> " * * * Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for delay in payment. * * * While the New York statute fixing the rate of interest (at 6%) is not controlling, the allowance of interest does not conflict with any state or federal policy, and we think that, in the circumstances of this case, a suitable rate is that prevailing in the state where the obligation was given and to be performed. * * * "

See also, *United States v. Mexican International R. Co., supra.*

(e) APPLICATION OF TAX REFUND TO INTEREST:

The District Court deducted a withheld tax refund of $307.73 of April 6, 1948 (R. 41-42) from the principal balance due. It is the contention of plaintiff (Statement of Points IV; R. 59-60) that a payment

should be applied first to reduction of interest due and the remainder, if any, to principal in accordance with the custom employed in commercial transactions, and that the method of eliminating the principal due, without consideration given to the interest is it is contended a practice which disregards the rights of the lender and has neither basis in logical calculation nor a foundation in accepted commercial practice.

CONCLUSION

For the reasons set forth above, plaintiff respectfully submits that the decision of the United States District Court for the Western District of Washington, Southern Division, should be reversed, insofar as it restricted the government's right to collect interest on defendant's renegotiation debt to three percent (3%) per annum and insofar as it applied the tax refund payment of $307.73 to discharge of part of the prinicpal amount instead of to accrued interest, and that the case should be remanded to the court below, with instructions to enter judgment for the government for interest, to be computed at six percent (6%) per annum, on defendant's renegotiation liability from and including the date of demand fixed by the Treasurer of the RFC Price Adjustment Board to and including the date of payment thereof, and that the withheld tax refund of $307.73 of April 6,

1948, be deducted from the amount of said interest, and judgment be entered for the principal balance of $13,341.59 plus interest at the rate of 6% per annum from September 29, 1945, as prayed for in the complaint, less said withheld tax refund of $307.73.

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney